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No. 97-750

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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1. The United States and the State of Alaska disagree on a matter of unquestionable significance to Alaska: the State's entitlement under the Alaska Statehood Compact to millions of dollars in mineral leasing revenues, a stream of revenue that both the United States and Alaska viewed as key to the financial viability of the new State. This case stands to decide that issue once and for all, and for that reason alone is unusually important. As explained in the petition, however, the significance of this case extends far beyond Alaska. At bottom, this case tests the obligation of the United States to keep its word in establishing the terms and conditions of statehood, a matter of general importance to all States, as well as those territories or commonwealths contemplating statehood, and of momentous importance to our federal system of government.

In its Opposition the United States says little to call into question the overriding importance of this case. What it does say simply sharpens the fundamental disagreement between the parties on the construction and enforceability of statehood compacts, and underscores the need for this Court's review.

2. The United States begins by suggesting that the threshold question presented—whether the Court should clarify the existing uncertainty over whether a statehood compact should be construed as both a statute and a contract or merely as routine legislation—is "academic." Opp. 11. Significantly, the United States does not dispute the current doctrinal confusion over this fundamental question, which was expressly acknowledged by the Court of Federal Claims. *See* Pet. App. 28a; Pet. 14-19. Nor does it assert that this question is not actually before the Court (since it indisputably is). Instead, the United States simply urges the Court to avoid this important question altogether on the ground that it does not matter whether the Compact is interpreted as a statute or a contract.

It plainly does. Whether a court begins from the basic premise that the Compact should be construed as routine legislation or as a contract between two separate parties establishes the focal point of the entire inquiry on which this case turns. The overriding objective in construing a contract is of course to give effect to *both* parties' intent,[1] whereas the overriding objective in construing a statute is to give effect to *Congress'* intent. Moreover, in giving ef-

[1] *See* Pet. 19 (discussing authorities). *See also Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 712 (1982) (White, J., joined by Powell, Rehnquist, and O'Connor, JJ., concurring in the judgment in part and dissenting in part) ("The intention of the parties upon the making of the contract, of course, governs the interpretation of the instrument."); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 112-113 (1989) (the basic objective in construing a contract is to give effect to "parties' intent," evidenced by the terms of the contract as well as "other manifestations" of such intent).

fect to the parties' intent in construing a contract, a court will frequently look to extrinsic evidence of that intent, including the circumstances surrounding the formation of the contract and other manifestations of the parties' understanding as to the bargain struck. *See* Pet. 19; 3 *Corbin on Contracts* § 536, at 28 (1960); *Restatement (Second) of Contracts* § 202(3)(a) (1981). Such evidence, however, is disfavored as a matter of statutory interpretation.

The United States argues that, in determining whether Alaska is entitled to the disputed mineral leasing revenues, a court should "look[] exclusively to congressional intent," eschewing any consideration of "the intent and understanding of the Alaskan people when they ratified the statehood compact." Opp. 21 & n.14 (internal quotation marks omitted). *See also* Br. for United States (Fed. Cir.), pp. 18-19 (extrinsic evidence of the parties' intent is "not entitled to *any* interpretative weight in construing Section 28(b)") (emphasis added). It is easy to see why the United States is so eager to avoid consideration of such evidence; as discussed in the petition, Pet. 19-23, that evidence amply confirms that the Compact Alaskans believed they had accepted in agreeing to statehood is materially different from the one being thrust upon them now by the United States.

The question of Alaska's rights and responsibilities under the Compact effecting its admission to the Union is too important to be left to a transparently result-oriented analysis founded upon the dubious supposition that it does not matter whether the Compact is construed as a statute or a contract, two entirely different inquiries. The Court should resolve the existing uncertainty over the nature of statehood compacts and decide the threshold question presented. It is only after that fundamental question is resolved that a court may fairly address Alaska's claims by interpreting the Compact in light of a firm understanding of whose intent governs—that of Congress or of both parties—and of what weight to give the extrinsic evidence of Compact formation—significant or none.

3. Because it ducks the threshold question presented, the United States devotes the bulk of its Opposition to the merits of Alaska's claims (largely from its skewed perspective that the Statehood Compact should be construed like a run-of-the-mine statute), an endeavor typically reserved for merits briefing. In doing so, the United States makes several misleading and incorrect statements as to the meaning of Section 28(b) of the Alaska Statehood Compact. Properly construed, however, Section 28(b) plainly embodies a promise that the new State of Alaska would receive—as part of the consideration for accepting the burdens and obligations of statehood—"ninety percent of the income from the minerals under the Leasing Act royalties that come in *from now on out.*" *Alaska Statehood: Hearings on S. 49 and S. 35 Before the Senate Comm. on Interior and Insular Affairs*, 85th Cong. 30-31 (1957) (Sen. Barrett) (emphasis added).[2]

For example, the United States astonishingly asserts that the ninety percent provision was enacted "separate and apart from statehood." Opp. 3. The legislative record

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[2] The United States repeatedly asserts that Alaska claims an "irrevocable right" to these revenues "in perpetuity." Opp. I, 9, 13, 17. To be clear, Alaska asserts the right of any typical contract party: to retain the benefit of its bargain for the duration of the agreement and to prevent unilateral abrogation of its rights under the agreement. As noted in the petition, Alaska recognizes that the Statehood Compact may be and has been modified in certain respects, but its " 'position has always been that the United States cannot unilaterally amend [it],' " Pet. 17 n.10 (quoting Alaska Attorney General Opinion), which is precisely what the United States has attempted to do in altering the long-established formula for allocating mineral leasing revenues. If the United States meant something other than "in perpetuity"—hardly a startling concept in any event in the case of exhaustible mineral reserves—its representatives should not have used terms such as "from now on out," *Hearings on S. 49 and S. 35, supra*, at 31, and "will continue to do so," Pet. App. 84a (Secretary Seaton). Alaskans are a plain-speaking people who tend to believe that people mean what they say.

directly refutes such a revisionist notion. The overriding purpose of the ninety percent provision—first introduced as an amendment to the 1957 *statehood* bill by Senator Barrett—was to give the new State "a chance to develop and to become one of the strong States of the Union." *Hearings on S. 49 and S. 35, supra,* at 30-31. The Department of the Interior specifically agreed that this provision should be included in the Compact. H.R. Rep. No. 85-156, at 2-3 (1957). When it enacted the 1958 Statehood Act, Congress viewed the ninety percent provision as a part of the Compact. *See* Pet. 5-6 (citing legislative record). And, when Secretary Seaton personally urged Alaskans to ratify the Compact, he made clear that the ninety percent provision was in fact a part of that Compact, *see* Pet. 7-8, a view that was reaffirmed as recently as January 1995 by the Department of the Interior. *Id.* 20-21 n. 12 (citing Department release concerning 1994 revenues).

The United States continues to assert that Section 28(b) was simply a "technical" provision of the 1958 Statehood Bill. Opp. 6. But the legislative record confirms Alaska's understanding that this provision was a "major" component of the Compact, included to help ensure that "the additional costs connected with statehood [would] be met." S. Rep. No. 85-1163, at 2-3 (1957). *See also* authorities cited at Pet. 5-6 & n.3.[8] The United States similarly sug-

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[8] Section 28(b) was not, as the United States asserts, "merely intended to substitute the State of Alaska into the already-existing MLA formula that had been extended to the Territory of Alaska under Public Law 85-88." Opp. 20-21. As the above-cited authorities confirm, it was included in the Compact to accomplish far more than such a technical substitution. Indeed, even the Court of Federal Claims dismissed the federal government's assertion "that section 28(b) was not a substantive part of the compact," holding instead that "[i]t was plainly viewed as one component in an effort to ensure that Alaska was financially viable," and "clearly was part of a group of provisions that, together, ensured the financial viability of Alaska." Pet. App. 33a. If Congress had wanted merely to effect a technical amendment to the MLA, it could have done so

gests that Section 28(b) was a relatively insignificant carrot to induce Alaskans into accepting statehood, given "the overall mix of property grants and revenue sharing provisions contained in the statehood bill." Opp. 17; *see id.* 18 & n.12. The pertinent question, however, is whether the ninety percent provision was embodied in the Compact, not whether the federal government today views it as a "relative[ly] significan[t]" component of that agreement. *Id.* 17. The decision of the people of Alaska to ratify the Statehood Compact was based on *all* of the land and property grants embodied in the Compact and touted by the United States in urging ratification, including the ninety percent provision. The United States is not free to pick and choose which of its provisions are significant enough for it to honor.

Pulling out all the stops, the United States claims that Section 28(b) is not even part of the Compact ratified by Alaskans. Opp. 22-23. That surely would come as a shock to the Alaskans who ratified the Compact; they were specifically asked to ratify "[*a*]*ll* provisions of the [Statehood Compact] * * * prescribing the terms and conditions of the grants of lands or *other property* therein made to the State of Alaska." Alaska Statehood Act, § 8(b), 72 Stat. 339, 344 (1958) (emphasis added). *See* Pet. 16. To secure ratification, Secretary Seaton himself "barnstormed" Alaska on the eve of the referendum "to make clear the effect of the Enabling Act and the propositions upon which [Alaskans] will vote." Pet. App. 88a (Anchorage Address). In doing so, he told Alaskans that the propositions "add up to one plain question: 'Do you want statehood now?' " *Id.* 88a-89a. And, in urging Alaskans to answer that question in the affirmative, he specifically emphasized that the Compact "reaffirms Alaska's preferential treatment in receiving 90 percent of all revenues from oil, gas, and coal leasing on the public domain."

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without going out of its way to incorporate the ninety percent provision in the Statehood Compact.

Id. 94a. *See* Pet. 7-8. Alaskans would have been dumbfounded if the United States had suddenly restricted those revenues in January 1959, immediately after President Eisenhower had certified Alaska as the Nation's 49th State; the passage of time may have muted the outcry but in no way diminishes the United States' duty to honor the promises it made in securing statehood.

The United States even claims that "Alaska fails to identify a single statement in the legislative record that expressly acknowledges either of the promises that Alaska alleges." Opp. 17. That is preposterous. As explained in the petition, the legislative record resounds with evidence that Congress appreciated that the Alaska Statehood Compact—quite unlike ordinary legislation—was irrevocable, Pet. 17 (citing legislative materials), and that the ninety percent provision was an important component of the Compact designed to ensure (along with the other property grants) that the new State would have the financial wherewithal to support itself, *id.* 5-6 & nn. 3-4, 15-16 (same). The fact that the United States focuses solely on the "legislative record" is indicative of its position that no other indicia of the parties' intent in consummating the Compact is relevant. As explained in the petition, that position is doctrinally flawed. But the United States is forced to advance it, because the extrinsic evidence of the parties' intent—especially Alaskans'—overwhelmingly points to the conclusion that the United States has gone back on its word.

4. At a minimum, the Court should hold this case pending its disposition in *New Jersey* v. *New York*, No. 120, Original. As is readily apparent from the Report of the Special Master in *New Jersey*, *see* 1997 WL 291594, at *15-*16, *23-24, *34-*45 (U.S. Mar. 31, 1997), as well as from the parties' exceptions to that Report, *see* Exceptions of the State of New York to the Report of the Special Master, pp. i, 11-21; Exceptions of the State of New Jer-

sey and Brief for the State of New Jersey in Support of Exceptions, pp. 6-10, 28-38, *New Jersey*, like this case, turns largely on a question of compact construction and, in particular, the weight to give extrinsic evidence of the parties' intent in entering into the compact.[4]

If—as seems likely based on the manner in which the case has been litigated thus far—this Court's decision in *New Jersey* addresses the proper construction of compacts, as compared with ordinary legislation, and, more particularly, the appropriate weight to give extrinsic evidence in construing such agreements, the Court should grant the writ in this case, vacate the judgment below, and remand for reconsideration in light of *New Jersey*. Alaska and the lower courts should be given the benefit of this Court's most recent pronouncement on the proper application of such basic principles before the door is shut once and for all on the important matters disputed in this case. This is especially true given that this case was decided on summary judgment before the opportunity—specifically requested by Alaska—for further inquiry into and development of the extrinsic evidence of the parties' intent in entering into the Statehood Compact. *See* Pet. 22 n.13.

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[4] The United States suggests in passing that *New Jersey* is distinguishable simply because it involves an "interstate compact, not a statehood [compact]." Opp. 24 n.16. But, as explained in the petition, statehood compacts share the same contractual attributes as interstate compacts and, like interstate compacts, are embodied in federal legislation. *See* Pet. 15-17. The principles of compact construction adopted and applied by the Court in *New Jersey* therefore would be applicable to the Compact at issue in this case.

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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